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Supreme Court of the United States

OCTOBER TERM, 1940

No. 507

ATANASIO SITCHON,
Petitioner (Plaintiff),

against

AMERICAN EXPORT LINES, INC.,
Respondent (Defendant).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH GARDINER,
Counsel for Respondent.

ARTHUR O. LOUIS,
JAMES M. ESTABROOK,
Of Counsel.

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Statement

The complaint, setting forth a claim for damages for personal injuries, was dismissed on the merits in the District Court for the Southern District of New York upon granting of respondent's motion for summary judgment predicated on proof that petitioner, under the advice of counsel, had executed a general release prior to the institution of the suit. The Circuit Court of Appeals for the Second Circuit unanimously affirmed. The opinion of the District Court is printed at pages 52-62 of the record and the opinion of the Circuit Court of Appeals is reported in 113 F. (2d) 830.

The Question Involved

Petitioner's statement, purporting to set forth the "Question Raised by the Case" at pages 4 and 5 of the petition herein, incorporates statements that the petitioner was *advised* by a Marine Hospital that there was no *sign* of a skull fracture and that the hospital diagnosis was inaccurate. The record does not support those statements. The question should have been stated as follows:

> May a seaman, *acting upon the advice of counsel during three months of negotiation,* execute a general release, the nature and purport of which the releasor admits he knew, and which release specifically included *known* and *unknown* injuries, thereafter repent of his bargain and avoid the legal effect of the release on his assertion he did not know the nature and extent of his injuries?

It should be borne in mind that the respondent did not provide the medical and surgical care and had no connection with the physicians who treated and examined the petitioner. The petitioner procured and submitted to the respondent, prior to the execution of the release, reports of the physicians who treated him. These reports contained diagnoses which were substantially the same as the diagnoses made by the physicians who examined the petitioner after the release was given. The petitioner specifically admitted that there was no fraud, deceit, compulsion or overreaching conduct on the part of the respondent.

The Facts

Petitioner, a seaman, age 40 (R., 14), an American citizen with some intermediate schooling and service in the United

States Army and Navy (R., 33), alleging he suffered personal injuries on June 10, 1938 while employed on respondents's vessel, the s/s Exchange (R., 6, 33), retained counsel to prosecute his claim for damages.

On August 19, 1938, his attorney initiated settlement negotiations prior to commencing suit (R., 6, 7, 10, 11). Thereafter there were a number of conferences between petitioner's attorney and a representative of respondent relating to the merits of the claim (R., 7, 13), petitioner's counsel obtaining and submitting to respondent's representative abstracts of the record of the United States Marine Hospital (R., 20), and stressing, particularly, the fact that the record disclosed injury to the skull (R., 21). During this period petitioner himself believed his condition was getting worse (R., 22). Respondent did not procure a physical examination (R., 20), nor was it represented by counsel during the negotiations (R., 24). Respondent's representative, to dispose of the claim for all time, and having in mind the possibility of being confronted with claims of head or brain injury where seamen contend they have been struck in the head, raised his prior offer of settlement to $180 (R., 21).

On November 14, 1938, the claim, after three months of negotiation, was settled (R., 11) within the State of New Jersey (R., 7, 17). An attorney attended on behalf of petitioner and witnessed the execution, by petitioner, of a special form of general release (R., 14-17). Petitioner was not deceived or misled as to the nature and effect of the release and he understood he finally and completely disposed of his claim, and that he would have no further right to seek additional damages and maintenance and cure (R., 7, 8, 9, 12, 13, 40, 41). Petitioner admits there was no fraud, deceit, compulsion or overreaching conduct in arriving at the settlement with him or in his execution of the release (R., 34, 40).

Petitioner's care at the Marine Hospital terminated on October 31, 1938, and he did not re-enter the hospital until May 8, 1939 (R., 25). On June 29, 1939 this action was commenced (R., 4).

The petition and accompanying brief contain statements that it was "represented" to the petitioner and that he was "told," "advised" and "assured" by a hospital physician that the X-ray, taken prior to the execution of the release, showed no fracture. There is no such proof in the record. Also, the record is clear that, as late as June 14, 1939, there was no retraction of the brain and no other abnormality except a faint widening in the mid-parietal region of the skull (R., 30). On the other hand, the record establishes that the Roentgenologist who examined the X-ray films made in July, 1939 (after the release was executed and after this suit was commenced), found substantially the same condition as did the Roentgenologist who, in August, 1938, examined the films of that date, which was prior to the date the settlement was consummated and the release signed (R., 32). The reference in the July, 1939 hospital record (R., 29) to the faint widening of the fronto-parietal suture as *probably* due to slight diastasis or diastatic fracture, can be misleading inasmuch as diastasis is defined surgically as "a separation of bones without fracture; dislocation" (R., 25).

Furthermore, the District Judge, on December 22, 1939, and before the motion for summary judgment was decided, granted leave to petitioner's attorney to submit affidavits *of physicians who treated him,* namely, the doctors at the Marine Hospital, on the question of whether petitioner was suffering from a fracture of the skull (R., 28). This was not availed of, petitioner instead merely submitting the affidavit of a new physician who saw petitioner for the first time on December 27, 1939 (R., 48). It is a fair inference

that the doctors at the Marine Hospital would not support the petitioner in his claim of fracture of the skull and brain injury.

On the record thus established, the District Court held that the release barred the suit and granted summary judgment in favor of respondent, which was unanimously affirmed by the Circuit Court of Appeals.

POINT I

No principle is involved, or issue presented, which this Court should review or pass upon.

(a) No Great Public Question Is Involved

The law of New Jersey as to the effect of a release in personal injury actions is not a great public question.

Petitioner seeks to review an order sustaining a release openly and fairly entered into by a seaman in the State of New Jersey. Under the decision of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the law of New Jersey is applicable, and under New Jersey law the release must be sustained.

In *Spangler* v. *Kartzmark,* 121 N. J. E. 64, 187 A. 770, the Court said (p. 772):

> "The great weight of authority supports the doctrine that a release of a claim for personal injuries cannot be avoided merely because the injuries proved more serious than the releasor, at the time of executing the release, believed them to be. Annotation, 48 A. L. R. at page 1464."

(b) There Is No Conflict Among the Circuits

All of the cases cited by petitioner, both in the petition and throughout the course of this litigation, are readily distinguishable in that in no case was a release set aside except when the plaintiff was either not represented by counsel or defendant's physician had participated in a wrongful determination of the extent of the injury.

Tulsa City Lines, Inc. v. *Mains,* 107 F. (2d) 377 (C. C. A. 10), is the only case petitioner has cited where a court upset the release of a plaintiff who had been represented by an attorney. It expressly follows *Erie Railroad Co.* v. *Tompkins, supra,* and is limited to a statement of the law of Oklahoma, where the release was given.

Great Northern Ry. Co. v. *Reid,* 245 F. 86 (C. C. A. 9), concerned the giving of a release in Montana, the same day as the accident, after erroneous statements by the defendant's doctor, and at a time when the plaintiff did not comprehend the nature of his act in signing the release.

Bonici v. *Standard Oil Co. of New Jersey,* 103 F. (2d) 437 (C. C. A. 2), was clearly distinguished by the same court in the present case, because Bonici, the plaintiff, was not represented by counsel and was also misled by the incorrect advice of defendant's physician.

POINT II

The decision of the Circuit Court of Appeals is in accord with both recognized public policy and the established authorities.

(a) Public Policy

As Judge CLARK said in *Bonici* v. *Standard Oil Co. of New Jersey, supra* (p. 439):

> "'* * * one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman' (*Harmon* v. *United States,* 5 Cir., 59 F. 2d 372, at p. 373), nevertheless a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. *Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty.*" (Italics ours.)

Also, in *Harmon* v. *United States,* 59 F. (2d) 372 (C. C. A. 5, 1932), the Court said, in sustaining a seaman's release (p. 373):

> "A release of a claim to a matter in or about to be in litigation 'is of the highest significance in general when it appears that the situation and circumstances of the parties show that it has been entered into with an understanding of the rights of the parties respectively, and with intent to include all matters of difference between them.' *Union Pacific R. Co.* v. *Harris,* 158 U. S. 326, * * *."

(b) The Authorities

We repeat that petitioner has cited no cases where a release was set aside in a personal injury suit, except where the plaintiff was either not represented by counsel or had been persuaded by an erroneous report from the defendant's physician. While this distinction disposes of petitioner's authorities, still in *Texas & Pacific Ry. Co.,* v. *Dashiell,* 198 U. S. 521, the release was by its own words limited to certain specified injuries.

In *Rosenblum* v. *Manufacturers Trust Co.,* 270 N. Y. 79, the Court was not considering a release or other form of

contract between two parties, each of whom had given consideration, but a voluntary declaration of trust, which, it was held, could be rescinded because of a mistake on the part of the person creating the trust.

In *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U. S. 373, this Court held merely that an offer to contract could be modified by the person making the offer before the offer was accepted, and did not deal in any way with the right of a party to rescind a contract, such as a release, after the offer had been accepted and the consideration had passed.

Among the cases involving releases in personal injury and death actions, unsuccessfully attacked on the ground there was a mistake of fact as to the identity, character and extent of the injuries, or that unknown or unanticipated injuries developed, or that the sum received was inadequate, or that there was fraud, are:

Cogswell, Ex'r. v. *Boston & Maine R. R. Co.,* 78 N. H. 379, 101 A. 145;

Spangler v. *Kartzmark, supra*;

Morris v. *Seaboard Air Line Ry.,* 23 Ga. App. 554, 99 S. E. 133;

Berry v. *Struble,* 20 Calif. App. (2d) 299, 66 P. (2d) 746 (1st App. Dist. Calif.);

Great American Indemnity Co. v. *Blakey,* 107 S. W. (2d) 1002 (Tex. Civ. App.) (Releasor represented by counsel);

Lynch, Adm'r. v. *Newman,* 37 N. J. L. J. 17;

Fivey v. *Pennsylvania R. R. Co.,* 38 Vroom (N. J.) 627;

Harmon v. *United States, supra* (Releasor represented by counsel);

Texas & New Orleans R. Co. v. *Hawkins,* 112 S. W. (2d) 1107 (Tex. Civ. App.) (Releasor represented by counsel);

Texas Employers Ins. Assn. v. *Arnold,* 114 S. W. (2d) 636 (Tex Civ. App.) (Releasor represented by counsel).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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